No. 7192

# UNITED STATES CIRCUIT COURT OF APPEALS

**Ninth Circuit**

PETER VAN DER WEYDE,
*Appellant,*

vs.

S. S. "TAIGEN MARU", her tackle, etc.,
*Respondent,*

OCEAN TRANSPORT CO., LTD., a corporation,
*Appellee,*

C. STANG ANDERSON, Norwegian Consul,
*Intervenor and Appellee.*

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

## BRIEF OF APPELLEE

LANE SUMMERS,
*Proctor for Appellee.*

HAYDEN, MERRITT, SUMMERS & BUCEY
Address:
Central Building,
Seattle, Washington.

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## INDEX

| | Page |
|---|---|
| Statement | 1 |
| Appellant's Assignment of Errors | 15 |
| Points and Authorities | 20 |
| Argument | 26 |
| Conclusion | 45 |


EXPLANATORY REFERENCE NOTE:

(The apostles on appeal in this cause include as an exhibit to exceptive allegations of the Norwegian Consul, and to the exceptions of the claimant, the transcript of record from the United States District Court of Oregon in appellant's former suit; appellant not having printed the apostles and such transcript not having been paged, it has been impossible for this brief to make page references to the transcript from the United States District Court of Oregon; for this reason, brief of appellee in referring to the transcript has indicated the same as follows: Ex. Tr.)

## TABLE

### Cases, Statutes and Texts

*Albani*, 169 Fed. 220 (D. C.) .......... 25
*Amsadoc*, 1923 A. M. C. 1017 (D. C.) .......... 21
*Belgenland*, 114 U. S. 355; 29 L. ed. 152 .... 24, 25, 36, 42
*Belvidere*, 90 Fed. 106 (D. C.) .......... 22
*Bifrost*, 8 Fed. (2d) 361 (D. C.) .......... 25
*Boheme-Ferm*, 15 Fed. (2d) 887 (D. C.) .......... 25
*Cambitsis*, 14 Fed. (2d) 236 (D. C.) .......... 24, 39
*Carter Shipping Co. v. Bowring*, 281 U. S. 515; 74 L. ed. 1008 .......... 41
*Cayuga*, 6 Fed. Sup. 280 .......... 24
*Chicago, etc. Co. v. Willard*, 220 U. S. 413; 55 L. ed. 521 .......... 20
*Clark v. Montezuma*, 1926 A. M. C. 594 (N. Y.) .... 22
*Cleveland*, 98 Fed. 631 (D. C.) .......... 23
*Comanche*, 47 Fed. (2d) 331 (D. C.) .......... 23
*Crapo v. Kelly*, 16 Wall. 610; 21 L. ed. 430 .......... 21

Page

*Crawford v. Ocean Carriers Co.*, 1924 A. M. C. 45 (D. C.) .......... 21
*Cutler v. Rae*, 7 How. 730; 12 L. ed. 890 .......... 20
*Cuzco*, 225 Fed. 169 (D. C.) .......... 22
*Dredge Lisbon*, 3 Fed. (2d) 408 (C. C. A. 9) .......... 20
*Egyptian Monarch*, 36 Fed. 773 (D. C.) .......... 22
*Esther*, 190 Fed. 216 (D. C.) .......... 22, 24, 38
*European*, 120 Fed. 776 (C. C. A. 5) .......... 22
*Ex parte Newman*, 81 U. S. 152; 20 L. ed. 877 .... 25, 42
*Falco*, 20 Fed. (2d) 362 (C. C. A. 2) .......... 21, 25
*Ferm-Boheme*, 15 Fed. (2d) 887 (D. C.) .......... 25
*Fred M. Lawrence*, 94 Fed. 1017 (C. C. A. 2) .......... 23
*Gasconier*, 8 Fed. (2d) 104 (D. C.) .......... 23
*Grand Trunk Ry. Co. v. Wright*, 21 Fed. (2d) 815 (C. C. A. 6) .......... 21
*Gray v. Hopkins-Carter etc. Co.*, 32 Fed. (2d) 877 (C. C. A. 5) .......... 23
*Greyhound*, 4 Fed. Sup. 184 (D. C.) .......... 23
*Hamilton*, 207 U. S. 398; 52 L. ed. 264 .......... 21
*Hanna Nielsen*, 273 Fed. 171 (C. C. A. 2) .......... 21
*Haytian Republic*, 154 U. S. 118; 38 L. ed. 930 .... 23
*Heracles*, 1926 A. M. C. 1231 (D. C.) .......... 25
*Heredia v. Davies*, 12 Fed. (2d) 500 (C.C.A. 4) .. 24, 37
*I. F. Chapman*, 241 Fed. 836 (C. C. A. 1) .......... 23
*John B. Rose Co.*, 254 Fed. 367 (D. C.) .......... 23
*John C. Sweeney*, 55 Fed. 540 (D. C.) .......... 21
*Josephine*, Fed. Cas. 12663 (D. C.) .......... 23
*Knappingsborg*, 26 Fed. (2d) 935 (D. C.) .......... 25
*Koenigin Luise*, 184 Fed. 170 (D. C.) .......... 25
*Krauss Bros. Lumber Co. v. Dimon S. S. Corp'n.*, 61 Fed. (2d) 187 (C. C. A. 9) .......... 17
*Krauss Bros. Lumber Co. v. Dimon S. S. Corp'n.*, 78 L. ed. 91 .......... 27
*Lamprecht et al. v. Cleveland etc. Co.*, 291 Fed. 876 (D. C.) .......... 23
*Lindrup*, 70 Fed. 718 (D. C.) .......... 21

Page

*Lippman v. Romich*, 26 Fed. (2d) 601 (C. C. A. 9) 33
*Mali v. Keeper of Common Jail*, 120 U. S. 1; 30 L. ed. 565 ........21, 28
*Manchurian Prince*, 1928 A.M.C. 1320 (N. Y. Ap. Div.) ........ 25
*Mansfield etc. Co. v. Swan*, 111 U. S. 379; 28 L. ed. 462 ........ 20
*Marie*, 49 Fed. 288 (D. C.) ........22, 24, 37
*Minnesota v. Northern Securities Co.*, 194 U. S. 48; 48 L. ed. 870 ........ 20
*Modjokerto*, 1931 A. M. C. 2006 (D. C.) ........ 25
*Monte A.*, 12 Fed. 331 (D. C.) ........ 20
*Nahor*, 9 Fed. 213 (D. C.) ........ 23
*Navarino*, 7 Fed. (2d) 743 (D. C.) ........ 22
*Newman, Ex parte*, 81 U. S. 152 ........25, 42
*New Texas*, 1926 A. M. C. 1514 (D. C.) ........ 25
*Nightingale*, 4 Fed. Sup. 494 (D. C.) ........ 23
*Oceano*, 148 Fed. 131 (D. C.) ........ 21
*Old Concord*, Fed. Cas. 10482 (D. C.) ........ 23
*Pacific Steamship Co. v. Peterson*, 278 U. S. 130; 73 L. ed. 220 ........ 33
*Patterson v. The Endora*, 190 U. S. 169; 47 L. ed. 1002 ........ 21
*Phantasy*, 4 Fed. Sup. 920 (D. C.) ........ 24
*Plamals v. Pinar del Rio*, 277 U. S. 151; 72 L. ed. 827 ........ 27
*Rainey v. New York etc. Co.*, 216 Fed. 449 (C. C. A. 9) ........21, 29
*Red Star etc. Co. v. Tug Forrest E. Single*, 1933 A. M. C. 1488 (D. C.) ........ 23
*Resigno v. Jarka Co.*, 162 N. E. 13 (N. Y.) ........ 22
*Re*: *John B. Rose Co.*, 254 Fed. 367 (D. C.) ........ 23
*Re*: *Ross*, 140 U. S. 453; 35 L. ed. 581 ........ 21
*Roebling Sons Co. v. Erickson*, 261 Fed. 986 (C. C. A. 2) ........ 33
*Sarpfos*, 1924 A. M. C. 347 (D. C.) ........ 24
*Strathlorne*, 1926 A. M. C. 1384 (D. C.) ........ 25

Page

*Susana*, 2 Fed. (2d) 410 (C. C. A. 4) .......... 23
*Thales*, Fed. Cas. 13855 (D. C.) .......... 23
*Thompson, etc. Ass'n. v. McGregor*, 207 Fed. 209 (C. C. A. 6) .......... 22
*Thorgerd*, 1926 A. M. C. 404 (D. C.) .......... 25
*Ulrich v. North German Lloyd*, 1929 A. M. C. 109 (D. C.) .......... 25
*Union*, Fed. Cas. 14346 (C. C.) .......... 23
*U. S. v. Ames*, 99 U. S. 35; 25 L. ed. 295 .......... 22
*U. S. v. Davidson*, 50 Fed. (2d) 517 (C. C. A. 1) .......... 23
*U. S. S. B. v Greenwald*, 16 Fed. (2d) 951 (C. C. A. 2) .......... 21
*U. S. v. Mayer*, 235 U. S. 55; 59 L. ed. 129 .......... 20
*U. S. v. Mt. Shasta*, 274 U. S. 469; 71 L. ed. 1156 .......... 27
*U. S. v. Rodgers*, 150 U. S. 249; 37 L. ed. 1071 .......... 21
*Washington*, 296 Fed. 158 (D. C.) .......... 21
*Welding Co. v. Gotham Marine Corp'n*, 47 Fed. (2d) 332 (D. C.) .......... 23
*Welhaven*, 55 Fed. 80 (D. C.) .......... 22, 24, 38
*Wenzler v. Robin Line S. S. Co.*, 277 Fed. 812 (D. C.) .......... 22
*William F. McRae*, 23 Fed. 557 (D. C.) .......... 23
*White Squall*, Fed. Cas. 17570 (C. C.) .......... 20, 23
*Wilson v. The John Ritson*, 35 Fed. 663 (D. C.) .......... 22

Benedict on Admiralty, 5th ed. Sec. 235, 364 .......... 20, 22
C. J. 1, p. 1306 .......... 22
Hughes on Admiralty, pp. 407, 408 .......... 22
Norwegian Treaty of 1827 .......... 24, 34, 35
R. C. L. Vol. 26, pp. 925, 926 .......... 24, 39

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UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

## BRIEF OF APPELLEE

### STATEMENT

The present cause, commenced April 18, 1931, in the United States District Court at Tacoma, is founded upon a claim for personal injuries alleged by admiralty libel in rem to have been suffered by appellant, Peter Van der Weyde, while aboard the respondent vessel upon the high seas in May, 1922.

The appellant, at the time of his alleged injuries being a subject of Her Majesty the Queen of the Netherlands, was a member of the Norwegian crew,

under Norwegian articles signed by him at Astoria, upon the respondent vessel (then the S.S. "Luise Nielsen") of Norwegian nationality, flying the Norwegian flag, under the ownership of B. Stolt Nielsen & Company, Inc., a corporation of the Kingdom of Norway.

A review of appellant's brief has suggested a chronological restatement of the historical facts material to this appeal, for ready understanding.

On September 15, 1922, there was instituted in the United States District Court at Portland a former suit in admiralty by the filing of a libel in rem in behalf of Peter Van der Weyde, as libelant, against the steamship "Luise Nielsen", as respondent, to recover damages (inclusive of wages, maintenance and cure) for personal injuries alleged to have been suffered as the result of unwholesome food and as the result of a fall on or about May 12, 1922, through an open, unguarded, unlighted hatch, while libelant was employed as a seaman on the high seas (Ex. Tr.).

Upon the issuance of due process in rem, as prayed by said libel, the respondent vessel was seized on September 16, 1922, and later released from custody of the U. S. Marshal on September 19, 1922, upon a claim of ownership and bond in the form of a stipulation to abide and pay the decree, filed by the master in behalf of the owner, B. Stolt Nielsen & Company, Inc., as claimant (Ex. Tr.).

On October 5, 1922, answer to said libel was filed by the claimant (Ex. Tr.).

In the same cause on January 30, 1923, and September 22, 1923, several depositions of claimant's wit-

nesses, together with numerous exhibits were filed (Ex. Tr.).

On April 9, 1924, following entry of order of court allowing intervention by the Norwegian Consul at Portland, he filed exceptive allegations, upon the basis of which was sought dismissal of said libel in the exercise of the court's sound discretion with permission for the adjustment of libelant's claims by the Norwegian Consul, in harmony with the laws of the Kingdom of Norway. The exceptive allegations of the Norwegian Consul alleged and showed: (1) that the respondent vessel was of Norwegian nationality; (2) that Peter Van der Weyde was a subject of the Netherlands; (3) that under the general maritime law, being a member of the crew of a Norwegian ship, signed under Norwegian articles, as concerned his rights and obligations, he was a Norwegian seaman; (4) that by such Norwegian law, an ill or injured seaman was to be entrusted to the Norwegian Consul for adjustment of claims and settlement of any dispute with the master or vessel; (5) that the articles signed by Peter Van der Weyde contained a provision that the interpretation of the rights and obligations under the contract should be decided by the Norwegian Consul and should not be decided in any foreign country by a foreign court; and (6) that since suffering injuries, Peter Van der Weyde had received hospital care at the expense of B. Stolt Nielsen & Company, Inc., and the Norwegian government (Ex. Tr.).

After argument on the exceptive allegations of the Norwegian Consul, amended libel was filed on May

12, 1924, impleading Asiatic American Steamship Company as an additional party respondent in personam (Ex. Tr.).

By such amended libel in behalf of Peter Van der Weyde, as libelant, his cause of action for personal injuries suffered on or about May 16, 1922, was reiterated—the only substantive change effected by the amended libel being to allege that the respondent Asiatic American Steamship Company, by virtue of a certain charter party, was the owner of the respondent vessel *pro hac vice*, and as such, personally liable for damages to libelant (Ex. Tr.).

On May 19, 1924, the respondent in personam, Asiatic American Steamship Company, filed its answer to said amended libel, denying the allegations that it was owner *pro hac vice* (Ex. Tr.).

On May 20, 1924, there was entered on the journal order of court overruling the exceptive allegations of the Norwegian Consul (Ex. Tr.).

On May 28, 1924, the owner of the respondent vessel, B. Stolt Nielsen & Company, Inc., as claimant, filed its answer to said amended libel, admitting the ownership of the respondent vessel as of the time libelant claimed to have sustained injuries, but denying such ownership as of the date of its answer, and denying that respondent in personam, Asiatic American Steamship Company, was the owner of the respondent vessel in *pro hac vice*, and denying numerous other allegations of said amended libel (Ex. Tr.).

By such answer, said claimant, for its affirmative defense, alleged that Peter Van der Weyde, said libelant, was a Dutchman, being a subject of the

Queen of the Netherlands; alleged that the respondent vessel was a Norwegian steamship, flying a Norwegian flag and owned by a Norwegian corporation; alleged that the contract of hiring between said respondent vessel and said libelant contained, among others, provision that "he shall serve on board the ship in the capacity of able seaman and ordinary seaman, with obligations and rights as stated in maritime law of the 20th of July, 1893 (Norwegian Law)", and that "any disagreement as to the interpretation of this contract shall be temporarily decided by the Norwegian Consul, and not in a foreign country be brought in a foreign court;" alleged that said quoted provisions of the Norwegian maritime law were applicable to the rights and obligations of said libelant, said respondent vessel, and said claimant; alleged that in addition to such provisions of the Norwegian maritime law, there was at the time of said libelant's alleged injuries in force in Norway, a Workman's Compensation Act known as the Law of August 18, 1911, relating to the insurance of seamen against accidents, providing for compensation insurance from a state administered fund for injured Norwegian seamen, and for foreign seamen injured on Norwegian vessels, and providing that if an accident renders it necessary to send an injured seaman to a hospital, the Royal Accident Insurance Office of Norway will make payment of the expenses connected with the treatment and maintenance of such injured seaman, even though he be a foreigner, without possessing or claiming any right to reimbursement from the owner of the ship upon which such injury occurred,

and further providing in the first paragraph of Section 32 of said law that "accidents coming within the scope of this law" (of which the accident to libelant is one) "impose no obligation upon the owner, master, or other officer of the ship concerned to pay personally, or out of the ship's estate, any compensation, unless it has been proved by a penal sentence that one or the other of said persons has caused the injury through intent or through gross negligence;" and alleged that said libelant had heretofore received hospital care and been maintained at the expense of over $1800.00 (Ex. Tr.).

On May 28, 1924, hearing was had in that cause by United States District Court for the District of Oregon, Honorable Robert S. Bean, judge presiding, at which hearing oral testimony and written depositions were offered, received and considered upon the issues presented by the exceptions and the exceptive allegations of such Norwegian Consul, and upon the issues presented upon the amended libel of libelant and the answer thereto of the respondent in personam, Asiatic American Steamship Company, and the answer thereto of claimant, B. Stolt Nielsen & Company, Inc. (Ex. Tr.).

As a result of such pleadings and the evidence received by said court at such hearing, there was entered by said court its decree on June 2, 1924, whereby said amended libel of libelant was dismissed, said decree reading as follows:

> "This case, having come on for trial the 28th day of May, 1924, upon the amended libel and the answers thereto of the claimant and the

respondent Asiatic American Steamship Company, and the Norwegian Vice Consul, Mr. E. P. Slovarp, appearing and requesting that the court refrain from taking jurisdiction of the case, and the court having heard the testimony of witnesses and the arguments of counsel,

"It is now CONSIDERED, ORDERED and DECREED that the amended libel be and the same is hereby dismissed, and that the claimant, and the respondent, Asiatic American Steamship Company, recover their respective costs and disbursements from the stipulators on libelant's cost bond, namely, H. A. Holmes and W. A. Fortiner, and that execution issue therefor, the said costs and disbursements being hereby taxed at $............ for the claimant, and $27.15 for the said respondent.

"Dated June 2, 1924.

"R. S. BEAN, Judge" (Ex. Tr.)

From the foregoing final decree, no appeal was ever taken by Peter Van der Weyde, nor any other party litigant in such former cause; and no application for review of said decree by any appellate court was ever made (Ex. Tr.).

For the period of seven years following such decree in the former suit it appeared that litigation upon the claims of Peter Van der Weyde had ended. Then, on April 18, 1931, through the same proctor acting in the former suit, he, as libelant, instituted the present cause by admiralty libel in rem, filed in the United States District Court at Tacoma against the same vessel (at this date the steamship "Taigen

Maru"), based upon the same cause of action (R. 3-8).

As before, the libel sought to recover damages (inclusive of wages, maintenance and cure) for personal injuries alleged to have been suffered as the result of unwholesome food, and as the result of a fall on or about May 16, 1922, through an open, unguarded, unlighted hatch, while libelant was employed as a seaman on the high seas (R. 3-8).

On April 25, 1931, the subsequent owner of the respondent vessel, Ocean Transport Co., Ltd., a Japenese corporation, being the present appellee, filed claim of ownership, together with its release bond, upon which, as previously, the respondent vessel was released from the custody of the U. S. Marshal, under a process issued upon said libel in this cause (R. 9-17).

Upon December 12, 1932, claimant, Ocean Transport Co., Ltd., filed exceptions to said libel and alleged and showed: (1) the cause of action set forth in the earlier admiralty libel in rem, filed in the United States District Court at Portland; (2) the claim to and the release of the respondent vessel upon bond filed by the former owner; (3) the answer of such owner to the libel; (4) the depositions of witnesses filed; (5) the intervention of the Norwegian Consul at Portland; (6) the exceptive allegations of such Consul; (7) the amended libel of Peter Van der Weyde; (8) the answer of the newly impleaded respondent in personam; (9) the answer of the Norwegian owner to the amended libel; (10) the hearing before the court upon said pleadings; (11) the final

decree of the court upon June 2, 1924, dismissing the case of Peter Van der Weyde, with costs; (12) the fact of no appeal or review before any appellate court; and (13) the complete identity of the libelant, Peter Van der Weyde, his cause of action, and the respondent vessel, both in that former suit and in the present suit (R. 21-28).

Under stipulation of proctors, material parts of the record in the former suit, certified by the clerk, were filed in the present suit as an exhibit to and as a part of claimant's said exceptions (R. 37).

From these recitals it is obvious that claimant, by its exceptions in the pending cause, fortified by certified record from the prior cause, pleaded the bar of *res judicata.*

Also, upon December 12, 1932, the Norwegian Consul at Seattle, intervention having been allowed by order of court, filed exceptive allegations (R. 18-20) which alleged and showed: (1) that the respondent vessel, in May, 1922, was Norwegian in nationality and ownership; (2) that Peter Van der Weyde was a subject of the Netherlands; (3) that under the general maritime law, being a member of the crew of a Norwegian ship, under Norwegian articles, his rights and obligations as a seaman were determined by the Norwegian law; (4) that, according to the provisions of the Norwegian law (quoted *verbatim*) disputes between a seaman and the vessel or its master were to be settled by the Norwegian Consul, and liability for illness or injury of the seaman rested upon the government treasury and not upon the owner of the vessel, under the Seamen's Compen-

sation Act of August 18, 1911; (5) that the articles of employment, signed by Peter Van der Weyde, expressly agreed that his rights and obligations be determined by the Norwegian law, and that any dispute be decided by the Norwegian Consul, and be not decided by any foreign court in any foreign country; (6) that Peter Van der Weyde had received medical, nursing and hospital care in Astoria, to the extent of approximately $2,000, at the expense of B. Stolt Nielsen & Company, Inc., former owner, and the Norwegian government; (7) that the provisions of the Norwegian law and of the ship's employment articles, signed by Peter Van der Weyde, had been proved and established in the earlier litigation before the United States District Court at Portland, as shown by the certified copy of the record transferred to the present cause on stipulation; (8) that although the respondent vessel was now of Japanese nationality and was no longer of Norwegian nationality, the Norwegian Consul was still officially concerned in this cause because the former owner, B. Stolt Nielsen & Company, Inc., in making sale to the present Japanese owner, warranted said vessel to be "free from all debts and incumbrances" (R. 29-36).

On January 9, 1933, the present cause came on for hearing, in the absence of proctor for Peter Van der Weyde, upon exceptions to the libel filed in behalf of claimant, and upon the exceptive allegations filed in behalf of the intervenor, the Norwegian Consul. At the conclusion of argument, the court announced from the bench a ruling, declining to take jurisdic-

tion and directing presentation of an order of dismissal (R. 38).

Subsequently, on January 23, 1933, on presentation of order of dismissal, libelant, claimant, and the Norwegian Consul all being represented in open court by proctors of record, the favorable ruling of the court, previously announced upon the exceptive allegations of the Norwegian Consul, was waived, and the court heard argument in behalf of libelant, in behalf of claimant, and in behalf of intervenor. Thereafter, the court again announced that it declined to entertain jurisdiction, libelant, however, being given leave to file further affidavit prior to the order of dismissal being signed (R. 39).

Thereafter, on January 26th, 1933, there was filed in behalf of libelant, Peter Van der Weyde, response to the exceptive allegations of the Norwegian Consul, by which the allegations of paragraph I were admitted to the effect that the intervenor in the present cause was the Norwegian Consul at Seattle; by which the allegations of paragraph II were admitted, to the effect that the respondent vessel, now the steamship "Taigen Maru", was formerly the steamship "Luise Nielsen" of Norwegian nationality; by which the allegations of paragraph III were admitted to the effect that libelant, Peter Van der Weyde, was a subject of the Netherlands; by which the allegations of paragraph IV were admitted to the effect that libelant was a member of the crew of the respondent vessel while a Norwegian steamship, and that his rights and obligations as a seaman were governed and determined by the Norwegian law; by which the al-

legations of paragraph V were admitted to the effect that libelant under the Norwegian law and as a member of a Norwegian crew, if taken ill or injured, should lawfully have been delivered over to the Consul at Portland for care, for settlement of any claims and for adjustment of any disputes he might have with the vessel or its master; and to the effect that the decision of the Consul should be binding upon libelant and the vessel or its master until the matter could be brought before a Norwegian court of justice; by which the allegations of paragraph VI were admitted, to the effect that the articles of employment with the respondent vessel, signed by libelant, contained a clause making determinative of libelant's rights and obligations as a seaman the Norwegian law of July 20, 1893, and another clause requiring that any disagreement under the contract be temporarily decided by the Norwegian Consul, and be not decided in a foreign country by a foreign court; by which the allegations of paragraph VII were admitted, to the effect that under the Norwegian Seamen's Compensation Act, known as the law of August 18, 1911, effective at the time of libelant's alleged injuries in May, 1922, libelant was entitled to compensation from a state administered insurance fund, but was not entitled to assert any liability against the respondent vessel or its owner, except following imposition of a penal sentence, based upon a wrong inflicted thought intent or gross negligence; by which the allegations of paragraph VIII were admitted, to the effect that libelant had received medical, nursing and hospital care at Astoria, Oregon, at the expense

of the former Norwegian owner of the respondent vessel and the Norwegian government, in a sum approximating $2,000; and by which the allegations of paragraph IX were admitted, to the effect that the Norwegian law, as alleged by exceptive allegations of the Norwegian Consul and the articles of employment signed by libelant, as alleged by the exceptive allegations of the Norwegian Consul, had been proven and established in the former cause, when pending before the United States District Court at Portland (R. 40-46).

Also on January 26, 1933, in addition to response to exceptive allegations of the Norwegian Consul, libelant filed separate response to claimant's exceptions; however, this response was excluded from the praecipe for transcript and hence does not appear in the apostles on appeal—possibly because of numerous admissions therein made by libelant. The response not being in the record on appeal would not be mentioned except for reference to favorable portions made by brief of appellant, to which appellee takes exception.

Following the filing of libelant's response to exceptive allegations of the Norwegian Consul and response to exceptions of claimant containing numerous admissions, order of dismissal pursuant to previous ruling by the court was entered on January 28, 1933, the substantive part of which reads as follows:

> "The above entitled cause having duly and regularly come on for hearing upon January 9th and 23rd, 1933, before the above entitled court, the undersigned judge presiding, upon

the exceptive allegations of the intervenor, C. Stang Anderson, as Consul of the Kingdom of Norway, and upon the exceptive allegations of the claimant, Ocean Transport Co., Ltd., upon the latter date, libelant appearing by his proctor, William P. Lord, and orally responding to such exceptive allegations, and having been allowed further time in which to reduce to writing and file such responses, and such having been done, and the court having given consideration to the consular protest against jurisdiction being entertained in the above entitled cause, and libelant's response thereto, and having concluded that, in the exercise of its discretion, the court should not hear said cause upon the merits;

"Now, therefore, it is hereby ORDERED:

"(1) That said cause be, and the same hereby is, dismissed;

"(2) That the release bond and the stipulations for cost, filed by said claimant and said intervenor, be, and they hereby are, discharged and the sureties thereon exonerated;

"(3) That said intervenor and said claimant have and recover from the libelant lawful costs hereafter to be taxed.

"Done this 28th day of January, 1933.

"EDWARD E. CUSHMAN,
"Judge." (R. 47)

Subsequently, on April 11, 1933, after due hearing upon claimant's motion to tax costs and libelant's motion to disallow costs, order of court was entered

allowing costs as taxed against libelant and in favor of claimant, in the sum of $342.05 (R. 50).

Shortly following, on April 21, 1933, notice of appeal from such order of dismissal was filed in the United States District Court at Tacoma, together with assignment of errors (R. 51, 52).

Thereafter, on or about August 21, 1933, this court entered an order granting to Peter Van der Weyde, as appellant, agreeably to the provisions of the federal statute applicable to seamen, the right to prosecute this appeal in *forma pauperis.* As interpreted by proctor for appellant, this order relieved appellant from preparing any copies of apostles, inclusive of the transcript of the proceedings in the United States District Court at Portland, together with the exhibits therein filed.

Hence, for convenience, the foregoing restatement of the brief of appellee has been extended to include, in chronological order, more detail than would otherwise have seemed appropriate.

## APPELLANT'S ASSIGNMENT OF ERRORS

By the assignment of errors filed in behalf of Peter Van der Weyde, appellant contends on this appeal as follows:

> "(1) The court erred in dismissing said cause;
>
> "(2) The court erred in holding that jurisdiction between the libelant and the intervenor, C. Stang Anderson, as Consul of the Kingdom of

Norway, was a discretionary jurisdiction in the court.

"(3) The court erred in entertaining the exceptive allegations and in not requiring the claimant and respondent and intervenor to answer." (R. 52)

The assignment of errors rather unusually concluded with a prayer, reading:

"Wherefore, libelant prays that the decree herein be reversed, and that the court try this cause *de novo* in this court and award libelant such damages as he has sustained by reason of the wrongful acts complained about in the libel." (R. 52)

Even though an assignment of errors does not customarily end with a prayer, it is little less than startling that the appellant should in any manner ask this court upon the appeal to try *de novo* a question that has had no opportunity for submission in the lower court, and has not, by orderly procedure, been there determined. In this cause the proceedings terminated in the trial court by order of dismissal, resulting from protest by a foreign consul as to the exercise of jurisdiction, before any ruling was made upon the exceptions to the libel filed in behalf of the respondent vessel by appellee as claimant, and before orderly conduct of the case required the filing of an answer in behalf of such respondent vessel by the appellee.

In passing, it perhaps should be observed that when interposing its exceptions to the libel, appellee sought

and reserved the right to answer on the merits by its concluding prayer (R. 28).

Whatever other order may be entered by this court on the present appeal, it would seem manifestly unfair to deny appellee a hearing in the lower court upon its exceptions to the libel, pleading the bar of *res judicata*, yet undecided by the lower court, and to deny appellee its right to answer the libel on the merits and try the issues raised thereby.

This court has set for itself precedent contrary to the request of appellant, in the case of *Krauss Bros. Lumber Company v. Dimon Steamship Corporation*, 61 Fed. (2d) 187 (C. C. A. 9), wherein it withdrew an original award of damages upon subsequent petition for modification, showing that the appellee had no opportunity to file an answer, because the appeal had resulted from an order of dismissal upon exceptions to jurisdiction. The record in that case contained no previous disclosure of a desire by the appellee to file an answer; as noted, the record in the present case not only contains an express reservation of the right to answer, but it also contains exceptions to the libel filed in behalf of the respondent vessel by appellee, raising the defense of *res judicata*, not yet decided below.

Further consideration of appellant's assignment of errors discloses more confusion, requiring clarifying explanation. The third error assigned by appellant says: "The court erred in entertaining the exceptive allegations and in not requiring the claimant and respondent and intervenor to answer."

In view of the record, this complaint as to the

conduct of the lower court seems hardly clear. Of course the respondent in this case is the steamship "Taigen Maru", incapable of a defense except through its claimant, the appellee. Appellee filed a pleading denominated "Claimant's Exceptions to Libel", raising the bar of *res judicata.* The Norwegian Consul, as intervenor, filed a pleading called "Exceptive Allegations", raising the question of jurisdiction. The lower court was never required to make any ruling upon appellee's exceptions because it decided favorably to the Norwegian Consul upon his exceptive allegations that in the exercise of sound discretion the court should not entertain jurisdiction of the cause.

Verification of the extent of the trial court's action is found in the recital of the dismissal order, from which this appeal was taken, reading:

> "* * * and the court having given consideration to the consular protest against jurisdiction being entertained in the above entitled cause, and libelant's response thereto, and having concluded that, in the exercise of its discretion the court should not hear said cause upon the merits, now therefore, it is hereby ORDERED:
>
> "(1) That said cause be and the same hereby is dismissed." (R. 47)

In other words, despite confusion created by the assignment of errors, the only question that can properly be raised by appellant for determination on this appeal is whether the trial court erred by recognizing the protest of the Norwegian Consul, and, upon the prayer of his exceptive allegations, entering

an order of dismissal in discretionary refusal to entertain jurisdiction.

The labor of this clarifying explanation would have been deemed unnecessary, except for continued confusion in the brief of appellant, where much effort is devoted to an attempt to persuade this court that appellant's libel is not vulnerable to the defense of *res judicata*, raised by appellee's exceptions still undetermined, and is not vulnerable to the defense of *laches*, which, as yet, has not been pleaded, and could not properly be pleaded by appellee except in its answer on the merits.

While appellant's libel for damages is surrounded with facts in the record, saturated to the dripping point with the obvious defenses of *res judicata* and *laches*, it remains that the brief of appellant is not justified in anticipating these defenses. And notwithstanding much argument in the brief of appellant, treating of these defenses, it finally does concede that the only question which appellant can raise is that of the trial court's discretionary refusal to entertain jurisdiction on the consular protest.

Brief of appellant (p. 11) says:

> "The court refused to take jurisdiction upon consideration of the consular protest, and found that it should not hear the cause on the merits. No other question was considered by the court, but an express finding is made by the court that it would not exercise its discretion in retaining jurisdiction."

Thus far, of necessity, the brief of appellee has been concerned solely with statements intended to

assist the court in an understanding of the history of the cause and of the condition of the record on this appeal. It now becomes appropriate to consider the reasons why the order of dismissal, entered by the lower court, was correct and should be affirmed by this court.

## POINTS AND AUTHORITIES

1. Federal courts will not hear a cause on the merits in the absence of jurisdiction; and where a federal court has no jurisdiction over the subject matter, objection to jurisdiction may be urged at any time in the trial court or in the appellate court; and even in the absence of objection, it is the duty of the court, on its own motion, to dismiss a case of which it has no jurisdiction.

> 1 Benedict on Admiralty, 5th Ed., Sec. 235;
> *Cutler v. Rae*, 7 How. 730; 12 L. ed. 890;
> *Mansfield, etc. Co. v. Swan*, 111 U. S. 379; 28 L. ed. 462;
> *Minnesota v. Northern Securities Co.*, 194 U. S. 48; 48 L. ed. 870;
> *Chicago, etc. Co. v. Willard*, 220 U. S. 413; 55 L. ed. 521;
> *United States v. Mayer*, 235 U. S. 55; 59 L. ed. 129;
> *The Dredge Lisbon*, 3 Fed. 2d 408 (C. C. A. 9);
> *The White Squall*, Fed. Cas. 17570 (C. C.);
> *The Monte A.*, 12 Fed. 331 (D. C.);

*The John C. Sweeney*, 55 Fed. 540 (D. C.);
*The Lindrup*, 70 Fed. 718 (D. C.);
*The Oceano*, 148 Fed. 131 (D. C.);
*The Washington*, 296 Fed. 158 (D. C.);
*The Amsadoc*, 1923 A. M. C. 1017 (D. C.);
*Crawford v. Ocean Carriers Co.*, 1924 A. M. C. 45 (D. C.).

2. The Norwegian law, being the law of the ship's flag, applies to a claim of a Dutch seaman, employed under Norwegian articles, injured aboard a Norwegian vessel on the high seas; and, since under the Norwegian law no lien against the vessel exists, the court is without jurisdiction of the subject matter.

*Crapo v. Kelly*, 16 Wall. 610; 21 L. ed. 430, 436;
*Mali v. Keeper of Common Jail*, 120 U. S. 1; 30 L. ed. 565; 567;
*In re Ross*, 140 U. S. 453; 35 L. ed. 581, 589;
*United States v. Rodgers*, 150 U. S. 249; 37 L. ed. 1071, 1077;
*Patterson v. The Endora*, 190 U. S. 169; 47 L. ed. 1002, 1007;
*The Hamilton*, 207 U. S. 398; 52 L. ed. 264;
*Grand Trunk Ry. Co. v. Wright*, 21 Fed. (2d) 815 (C.C.A. 6);
*The Falco*, 20 Fed. (2d) 362 (C.C.A. 2);
*U. S. S. B. v. Greenwald*, 16 Fed. (2d) 951 (C.C.A. 2);
*The Hanna Nielsen*, 273 Fed. 171 (C.C.A.2);
*Rainey v. New York, etc. Co.*, 216 Fed. 449, 454 (C.C.A. 9);

*Thompson etc. Ass'n. v. McGregor*, 207 Fed. 209 (C.C.A. 6);
*The European*, 120 Fed. 776, 780 (C.C.A.5);
*Navarino*, 7 Fed. (2d) 743, 744 (D.C.);
*Wenzler v. The Robin Line Steamship Co.*, 277 Fed. 812 (D. C.);
*The Cuzco*, 225 Fed. 169, 175 (D. C.);
*The Esther*, 190 Fed. 216, 219 (D. C.);
*The Belvidere*, 90 Fed. 106 (D. C.);
*The Welhaven*, 55 Fed. 80 (D. C.);
*The Marie*, 49 Fed. 288 (D. C.);
*The Egyptian Monarch*, 36 Fed. 773, 774 (D. C.);
*Wilson v. The John Ritson*, 35 Fed. 663 (D. C.);
*Resigno v. Jarka Co.*, 162 N. E. 13 (N. Y.);
*Clark v. Montezuma*, 1926 A. M. C. 594 (N. Y.).

3. Even if a lien against the vessel did originally exist, nevertheless, no jurisdiction of the subject matter in this present cause was ever acquired by the lower court or by this court, because the respondent vessel was forever released from such lien by the bond or stipulation to abide and pay the decree, filed in the former suit pending before the United States District Court at Portland.

Hughes on Admiralty, pp. 407, 408;
1 Corpus Juris, 1306;
1 Benedict on Admiralty, 5th Ed. Sec. 364;
*United States v. Ames*, 99 U. S. 35; 25 L. ed. 295;

*The Haytian Republic*, 154 U. S. 118; 38 L. ed. 930;
*The Union*, Fed. Cas. 14346 (C. C.);
*The White Squall*, Fed. Cas. 17570 (C. C.);
*The Fred M. Lawrence*, 94 Fed. 1017 (C. C. A. 2);
*The I. F. Chapman*, 241 Fed. 836 (C. C. A. 1);
*The Susana*, 2 Fed. 2d 410, 412 (C. C. A. 4);
*Gray v. Hopkins-Carter, etc. Co.*, 32 Fed. 2d 877 (C. C. A. 5);
*United States v. Davidson*, 50 Fed. 2d 517 (C. C. A. 1);
*The Old Concord*, Fed. Cas. 10482 (D. C.);
*The Josephine*, Fed. Cas. 12663 (D. C.);
*The Thales*, Fed. Cas. 13855 (D. C.);
*The Nahor*, 9 Fed. 213 (D. C.);
*The William F. McRae*, 23 Fed. 557 (D. C.);
*The Cleveland*, 98 Fed. 631 (D. C.);
*Lamprecht, et al., v. Cleveland, etc. Co.*, 291 Fed. 876 (D. C.);
*Re*: *John B. Rose Co.*, 254 Fed. 367 (D. C.);
*The Gasconier*, 8 Fed. 2d, 104 (D. C.);
*The Comanche*, 47 Fed. 2d 331 (D. C.);
*Welding Co. v. Gotham Marine Corp'n.*, 47 Fed. 2d 332 (D. C.);
*Red Star etc. Co. v. Tug Forest E. Single*, 1933 A. M. C. 1488 (D. C.);
*The Greyhound*, 4 Fed. Sup. 184 (D. C.);
*The Nightingale*, 4 Fed. Sup. 494 (D. C.);

*The Phantasy*, 4 Fed. Sup. 920 (D. C.);
*The Cayuga*, 6 Fed. Sup. 280 (D. C.);

4. Under the treaty between the Kingdom of Norway and the United States, the Norwegian Consuls are granted authority "to sit as judges and arbitrators" to determine the claims of seamen against Norwegian vessels, and the admiralty courts of this country are bound, without exercise of discretion, to dismiss such suits in recognition of consular jurisdiction.

Treaty of Commerce and Navigation, 1827, between the United States and the Kingdom of Sweden and Norway — Article XIII, Vol. 2, Treaties, Conventions, International Acts, Protocols and Agreements between the United States and other Powers, 1776-1909, pp. 1748, 1775;
*The Belgenland*, 114 U. S. 355, 364; 29 L. ed. 152, 155;
*Heredia v. Davies*, 12 Fed. (2d) 500, 501 (C. C. A. 4);
*The Marie*, 49 Fed. 286 (D. C.);
*The Welhaven*, 55 Fed. 80 (D. C.);
*The Esther*, 190 Fed. 216, 221;
*The Sarpfos*, 1924 A. M. C. 347 (D. C.);
*The Cambitsis*, 14 Fed. (2d) 236 (D. C.);
26 R. C. L. pp. 925, 926.

5. Even in the absence of treaty granting consular authority, the exercise of jurisdiction by federal courts over admiralty suits involving a claim by a foreign seaman against a foreign vessel is discretionary; such jurisdiction will not be maintained over the protest of a foreign consul, except when, in the exercise of sound discretion, it is necessary to prevent actual injustice; and the refusal to maintain jurisdiction in a particular case will not be disturbed in the appellate court except for abuse of discretion by the trial court.

*Ex Parte Newman*, 81 U. S. 152, 168, 169; 20 L. ed. 877, 880;

*The Belgenland*, 114 U. S. 355, 368; 29 L. ed. 152, 157;

*The Falco*, 20 Fed. (2d) 362 (C. C. A. 2);

*The Modjokerto*, 1931 A. M. C. 2006 (D.C.);

*Ulrich v. North German Lloyd*, 1929 A. M. C. 109 (D. C.);

*The Manchurian Prince*, 1928 A. M. C. 1320 (N. Y. Ap. Div.);

*The Knappingsborg*, 26 Fed. (2d) 935 (D.C.);

*The Ferm—The Boheme*, 15 Fed. (2d) 887 (D. C.);

*The Heracles*, 1926 A. M. C. 1231 (D. C.);

*The New Texas*, 1926 A. M. C. 1514 (D. C.);

*The Strathlorne*, 1926 A. M. C. 1384 (D.C.);

*The Thorgerd*, 1926 A. M. C. 404 (D. C.);

*The Bifrost*, 8 Fed. (2d) 361 (D. C.);

*The Koenigin Luise*, 184 Fed. 170 (D. C.);

*The Albani*, 169 Fed. 220 (D. C.).

## ARGUMENT

As disclosed by the foregoing outline of points and authorities, appellee on this appeal is not urging against appellant's libel the defenses of *res judicata* and laches, because the trial court's order of dismissal was not based upon those defenses. Therefore, much of the brief of appellant is extraneous to questions requiring consideration.

The ruling of the District Judge was formulated on the theory that the lower court held jurisdictional authority over this cause, but that the character of the case was such as to clothe that authority with discretion to accept or refuse hearing on the merits. Appellee agrees that the dismissal was correct, but appellee urges that actually the court below, and hence this court, never acquired jurisdiction of the subject matter of this cause. If this stand is well grounded, the authorities heretofore listed illustrate the applicable principle, well entrenched, that not only is appellee's objection to jurisdiction timely, though first made on appeal, but the appellate court's duty, apart from objection by any litigant, is to dismiss.

In this case appellee contends there is no lien existent in favor of appellant against the respondent vessel. The present cause is solely *in rem* against the respondent vessel. There being no lien, then there is no subject matter of which the court ever obtained jurisdiction.

The existence of the lien is jurisdictional in a proceeding *in rem*, as reflected by numerous decisions, including the recent opinions of the United States Su-

preme Court in *Krauss Bros. Lumber Co. v. Dimon Steamship Corp'n.*, 78 L. ed. 91 (Nov. 13, 1933); in *Plamals v. Pinar del Rio*, 277 U. S. 151, 155; 72 L. ed. 827, 829, affirming 16 Fed. (2d) 985 (C.C.A. 2); and in *U. S. v. Mt. Shasta*, 274 U. S. 469; 71 L. ed. 1156.

Why is no lien available to appellant in this case against the respondent vessel? First: Because appellant's rights and the vessel's obligations are governed by the Norwegian law, which creates no lien. Second: Because even if a lien did originally exist, the respondent vessel was forever freed by stipulated release from custody after seizure under appellant's libel in the former suit at Portland.

With respect to the first point, appellant was an alien; he went aboard the Norwegian vessel for a voyage to the Orient; he signed Norwegian articles expressly subjecting him to the Norwegian law (Ex. Tr.); he became a Norwegian seaman. While so employed, he suffered an accident on the high seas "about six days out from Astoria, Oregon" (R. 3).

On these facts, it is immaterial that the employment contract was signed in an American port, that appellant had been living in this country, and that the vessel was seized in a court of the United States. As settled by the maritime decisions, the law of the ship's flag fixes the rights and obligations resulting from such an accident.

From the broad field of available decisions, only a portion of which are cited herein, it would seem sufficient to quote from only two opinions.

In an old case considered by the Supreme Court the

facts were much more favorable to a ruling denying the operation of the law of the ship's flag than in the present case because the litigation resulted from a murder committed aboard a foreign vessel in an American port, while here the litigation results from an accident aboard a foreign vessel on the high seas outside of the territorial jurisdiction of this country.

In deciding the former case, the Supreme Court said:

> "From experience, however, it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship and the general regulation of the rights and duties of the officers and crew towards the vessel or among themselves. And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquility of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require."

*Mali v. Keeper of Common Jail*, 120 U. S. 1; 30 L. ed. 565 at 567.

Disregarding numerous other decisions of the Supreme Court, reference is made to former opinion of this appellate court wherein it was said:

"When Rainey, although a citizen of the state

of Washington, went before the British consul at Seattle and signed the shipping articles, and thereupon stepped upon the British ship flying the British flag as a member of its crew, as the record shows he did, he stepped upon British territory and became entitled to the protection and benefit of all British law in behalf of British seamen, and subject to all of its obligations and liabilities."

*Rainey v. New York etc. Co.*, 216 Fed. 449 at 454 (C. C. A. 9).

And now it becomes appropriate to inquire as to the law of Norway relative to the present controversy. So far as material, the applicable Norwegian law has been established in the record as conceded by appellant. The foreign law and the provisions relative thereto contained in the ship's articles, signed by appellant, as already summarized herein, were set forth by the exceptive allegations of the Norwegian Consul (R. 30-34). The statements contained in such exceptive allegations as to such articles and such Norwegian law were admitted by appellant's response thereto (R. 40). Appellant even admitted that the articles, and material provisions of the law, had been previously proven in the former litigation when pending at Portland. In this latter regard the response of appellant (R. 40) admitted paragraph IX of the exceptive allegations filed by the Norwegian Consul, which read as follows:

"That all of the foregoing facts in respect to the several provisions of the Norwegian law, the ship's articles, and the relief afforded to libel-

ant, have been disclosed and established by sworn testimony of record in the former admiralty cause, instituted by the same person who is libelant here against the same steamship which is respondent herein (then named the S. S. 'Luise Nielsen') such former admiralty cause being No. A-9008 in the United States District Court for the District of Oregon, entitled 'Peter Van der Weyde, libelant, vs. the Steamship Luise Nielsen, etc., respondent, a certified copy of the record in which cause has been transferred to the present cause and made a matter of record herein." (R. 34)

The Norwegian law, as proved in the present cause, does not afford libelant a lien against the respondent vessel, since the Norwegian Seamen's Compensation Act, known as the law of August 18, 1911, provides insurance for seamen against accidents, the money being available from a state administered compensation fund, and since that act contains provision to the effect that "accidents coming within the scope of this law (of which the accident to libelant in the present cause is one) impose no obligation upon the owners, master or other officer of the ship concerned to pay personally or out of ship's estate any compensation, unless it has been proved by a penal sentence that one or the other of such persons has caused the injury with intent or through gross negligence" (R. 33). Needless to say, the exception contained in the Norwegian law is not applicable as to appellant's case because the facts necessary to bring the exception into operation have never existed, and appellant, him-

self, has not even contended that the exception should be invoked in his favor.

In this case not only has the existence of the Norwegian Seamen's Compensation Act been established as controlling law, but likewise it has been proved that appellant has actually received benefit thereunder afforded by the Norwegian government in the medical, nursing and hospital care furnished in Astoria, Oregon, at governmental expense (R. 33, 40).

Before passing to other considerations, it may not be inappropriate to observe that maritime decisions of the courts can be located, applying the maritime law of the United States to claims of American seamen sustaining injuries in American ports on foreign vessels; but all such cases involve very different facts from the facts appearing in this case; and one most essential difference of fact usually is that the applicable foreign law of the ship's flag has not been established by the record.

In discussing the second reason for the non-existence of any lien in favor of appellant against the respondent vessel, it is essential to examine our own maritime law. Authoritative and reasoned decisions have concluded that once a vessel has been seized on admiralty process *in rem*, and has been released from custody by bond or stipulation, not vitiated by fraud, the vessel is wholly and forever purged of the lien and may not be again subjected to seizure in the same or any other suit based upon the original cause of action. The theory of the cases upon the subject is that the indefinite continuation of secret liens should not be encouraged, and that the ship having been once im-

pounded, is completely freed therefrom by the substitution of other security for the lienable cause of action. The principle is applied not only to demands of private citizens, but also to governmental claims of penalty and forfeiture against vessels, as shown by the citations previously listed in this brief.

The application of this doctrine in the present case is clear. It is not disputed that the appellant in the present case was libelant in the former case. It is not disputed that the respondent vessel here was the respondent vessel there. Likewise, it is not disputed that the respondent vessel was seized and released on bond or stipulation in the former admiralty suit, commenced by appellant at Portland, transcript from which is an exhibit in the record before this court (Ex. Tr.). Any careful examination of the libel and amended libel in the former litigation (Ex. Tr.), coupled with comparative scrutiny of the libel in this cause (R. 3-8) shows the identity of the cause of action involved in both cases.

In each instance appellant sued, by admiralty libel *in rem* against the respondent vessel, to recover damages (inclusive of wages, maintenance and cure) for personal injuries alleged to have been suffered as the result of unwholesome food and as the result of a fall on or about May 16, 1922, through an open, unguarded, unlighted hatch, while employed aboard said vessel on the high seas.

It is true that by the libel in the pending litigation the amount of damages claimed by appellant is greater than the amount of damages claimed by him as libelant in the case begun at Portland in September, 1922.

However, the authorities listed to the point in this brief demonstrate that the difference in the amount of damages sought is immaterial, as not affecting the principle of the vessel's immunity from repeated seizure. It is also true that by the libel in the present cause appellant's proctor has separately pleaded appellant's claim for wages as an element of damage. However, recovery of wages lost was sought by the libel previously filed in behalf of appellant at Portland. Certainly the elements of appellant's cause of action here, and the cause of action alleged in the former suit, are not different because items of recoverable damage first were grouped together and later segregated by the pleader. The libel filed in Portland expressly sought to make recovery of lost wages. Even were the item not specifically mentioned, appellant's former libel to recover damages by way of indemnity was inclusive of his right to recover for wages, maintenance and cure. This principle has been authoritatively recognized.

> *Pacific Steamship Co. v. Peterson*, 278 U. S. 130; 73 L. ed. 220;
>
> *Lippman v. Romich*, 26 Fed. (2d) 601 (C. C. A. 9);
>
> *Roebling Sons Co. v. Erickson*, 261 Fed. 986, 988 (C. C. A. 2).

With this principle of law in mind, it is readily apparent that there is no difference between the cause of action alleged in behalf of appellant in the former litigation and the cause of action upon which he seeks recovery here. The only difference between the libels filed in the former case and the libel now under

consideration is a difference of immaterial, superfluous detail.

To avoid the possibility of confusion, appellee is not now pressing the defense of *res judicata*, but is urging the immunity of the respondent vessel from any maritime lien in this case requisite to give jurisdiction over the subject matter of the cause. Although to some extent the elements necessary to the two contenions are coincident, the successful plea of *res judicata* requires the existence of a former judgment, while, in contrast, immunity from seizure of a vessel, based on previous attachment and release, is in some respects more analogous to the criminal bar of "former jeopardy", wherein a judgment is unnecessary.

Despite the elemental differences between the plea of *res judicata* and the jurisdictional bar of immunity, it is still fair to note that if appellant was not satisfied with the order of dismissal entered by Judge Bean in the United States District Court of Oregon, having substituted a bond or stipulation to abide and pay the decree, for the vessel itself, it was incumbent upon appellant to have appealed from the order of dismissal to keep available the security which appellant had voluntarily accepted.

For an additional reason appellee urges that in this cause no jurisdiction was ever acquired by either the lower court or this court.

When Sweden and Norway were a united kingdom, in 1827 a treaty was concluded with the United States, known as the Treaty of Commerce and Navigation. This treaty was ratified and proclaimed effective by the United States in 1828 (Vol. 2, Treaties,

Conventions, International Acts, Protocols and Agreements between the United States and other Powers, 1776-1909, Malloy, pp. 1748-1775). The treaty continued operative and binding at the time of appellant's accident in 1922, and thereafter until the effective date of superseding treaty between the Kingdom of Norway and the United States, signed June 5, 1928, as reflected by official publication of the United States, entitled "Treaty Series No. 852," issued at Washington in 1932 by the Superintendent of Documents.

By Article XIII of the treaty of 1827, in so far as material, it was provided:

> "The consuls, vice consuls or commercial agents, or the persons duly authorized to supply their places, shall have the right as such to sit as judges and arbitrators in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to their charge, without the interference of the local authorities, unless the conduct of the crews or the captain should disturb the order or tranquillity of the country, or the said consuls, vice consuls or commercial agents should require their assistance to cause their decisions to be carried into effect or supported. It is, however, understood that this species of judgment or arbitration shall not deprive the contending parties of the right they have to resort, on their return, to the judicial authority of their country."

It is apparent from the foregoing provision of the Norwegian treaty that the Consul at Portland who

intervened in appellant's suit before the United States District Court of Oregon, had judicial authority to determine a dispute between appellant, as a Norwegian seaman and the Norwegian vessel upon which he claims to have suffered injuries at sea.

From the maritime decisions of the federal courts it likewise appears that, in the face of such a treaty, the admiralty courts do not have a jurisdiction which may, in the exercise of discretion, be accepted or rejected. Admittedly, in the absence of such a treaty, the admiralty courts possess jurisdiction, and are free to exercise discretion. However, in the presence of such a treaty, where a consular officer is available, the jurisdiction is possessed by the Consul and not by the admiralty court.

This conclusion is reflected by the United States Supreme Court in the much cited case of *The Belgenland*, 144 U. S. 355, 364; 29 L. ed. 152, 155. By this opinion the court said:

> "Of course, if any treaty stipulations exist between the United States and the country to which a foreign ship belongs with regard to the right of the consul of that country to adjudge controversies arising between the master and crew, or other matters occurring on the ship exclusively subject to the foreign law, such stipulations should be fairly and faithfully observed."
>
> *The Belgenland*, 144 U. S. 355, 364; 29 L. ed. 152, 155.

The same principle is recognized by much more recent language, as follows:

> "In the absence of treaty stipulation, the courts

of admiralty of the United States have jurisdiction of all matters appertaining to a foreign ship while in the ports of this country. (Citations)"

*Hereida v. Davies*, 12 Fed. (2d) 500, 501 (C. C. A. 4).

The doctrine was recognized by the admiralty courts of this country many years ago, as illustrated by a decision dismissing a libel against a Norwegian vessel, filed by a seaman signing articles in an American port, wherein the opinion, after quoting from the same treaty, used the following language:

"This is the very case provided for in the treaty, of which the consul is thereby made the 'judge and arbitrator'; and this court, being a local authority, is prohibited from interfering with him."

*The Marie*, 49 Fed. 286, 288.

Subsequently, another federal court considered the identical treaty in a case instituted against a Norwegian vessel by an American citizen, and in its opinion said:

"The earnest desire of this court to afford to seamen every right and protection authorized by the law, and the sympathy I have with that class of people to which libelant belongs, strengthened by the able and impressive argument of his counsel, induced me to take for examination and careful consideration the matter and argument submitted, before a decision by the court denying the jurisdiction prayed for; but the consideration has only served to confirm the correctness of the decision of this court in the case of *The Burchard*,

42 Fed. Rep. 608, where it was held that one court had no jurisdiction in a case very similar to this one. In addition to that case, I cite, as sustaining the decision in this, *The Salomoni*, 29 Fed. Rep. 534; *The Marie*, 49 Fed. Rep. 286; *The Elwine Kreplin*, 9 Blatchf. 438; *In re Ross*, 140 U. S. 453, 11 Sup. Ct. Rep. 897."

*The Welhaven*, 55 Fed. 80, 81.

Somewhat later the same treaty was reviewed, with the same result, in a suit by a German seaman against a Swedish vessel. In concluding that the treaty deprived the admiralty court of jurisdiction, the well-reasoned opinion is too extended for full quotation; however, in recognition of the law established by the Supreme Court of the United States, it said:

"Where treaty stipulations exist, however, with regard to the right of the consul of a foreign country to adjudge controversies arising between the master and the crew, or other matters occurring on the ship exclusively subject to the foreign law, such stipulations are the law of the land, and must be fairly and faithfully observed."

*The Esther*, 190 Fed. 216, 221.

Of much more recent date is the opinion in a case involving a suit by a German seaman against a Greek vessel, where the treaty provision was similar to the provision of the Norwegian treaty. In this case the court said:

"The exclusion of the jurisdiction of the court, under the language of the Convention, provides that the consular officers of respective nations

> shall alone take cognizance over differences between the captains, officers and crew, particularly in reference to the adjustment of wages, and no distinction is made between Greek seamen and other seamen upon Greek vessels. The want of jurisdiction is not subject to the discretion of the court on the ground that the libelant is a German and not a Greek seaman."

*The Cambitsis*, 14 Fed. (2d) 236, 237.

It is true that the Norwegian treaty was not, like the Norwegian statutes, established by the proofs in the present and in the former suit commenced by appellant. However, as distinguished from the laws of a foreign country, it is incumbent upon the federal courts to take judicial notice of treaties of the United States with foreign countries.

> "A treaty, then, is a law of the land, as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined; and when such rights are of a nature to be enforced in a court of justice, the court resorts to the treaty for a rule of decision for the case before it, as it would to a statute. All courts, state and national, must take judicial notice of and be governed by a treaty of the United States."

26 R. C. L. 926.

If this court gives full recognition to the Norwegian treaty, in harmony with its obligation as announced by the Supreme Court of the United States, then it becomes immaterial whether under the Norwegian law a lien does or does not exist against the

respondent vessel, and it likewise becomes immaterial whether the respondent vessel was or was not purged of the lien by former seizure and release in the United States District Court of Oregon, for, irrespective of the rights and obligations between appellant and the respondent vessel under the Norwegian law, and irrespective of the rights of the respondent vessel to immunity under the maritime law of this country, the sole right to adjudicate the difference between appellant and the respondent vessel was within the jurisdiction of the Consul at Portland. And it appears conclusively from the record that not only was the Norwegian Consul officially present in the jurisdiction where appellant instituted his former suit, but that Norwegian Consul was ready and willing to act in his official capacity with respect to appellant's claims, and, in fact, did act, to the extent of securing for him a measure of assistance and relief. Whether or not such Norwegian Consul gave to appellant all the remedy to which he was entitled is for the Norwegian Consul or the tribunals of Norway to determine.

If any of the contentions which appellee has heretofore made in this brief are sound, it was the duty of the lower court to dismiss appellant's libel as a matter of judicial obligation rather than as a matter of discretion. However, for the sake of argument, it may be assumed that the District Court was clothed with discretion. Immediately arises the query as to the extent of this court's right to review and reverse a discretionary decision by a trial court. In this connection the Supreme Court of the United States has indicated that even it is somewhat restricted. In an

admiralty cause involving foreigners, wherein the District Court, in the exercise of discretion, had refused to accept jurisdiction, and the Circuit Court of Appeals had likewise concluded that jurisdiction should not be accepted, the opinion of the Supreme Court said:

> "The retention of jurisdiction of a suit in admiralty between foreigners is within the discretion of the District Court. The exercise of its discretion may not be disturbed unless abused. (Citations) * * * It was for the District Judge to consider the facts appearing and the inferences which he might draw from them, and reach his own conclusion as to the convenience of witnesses as well as the other factors upon which he decided that justice would be best served by leaving the parties to their suit in England."
>
> *Carter Shipping Co. v. Bowring*, 281 U. S. 515, 517, 518; 74 L. ed. 1008, 1010, 1011.

Appellant has assigned error (R. 52) because the trial court found the case presented a question of "discretionary jurisdiction."

As appellee has already observed, if the trial court was in error in finding that its jurisdiction was discretionary, its error was not in dismissing the libel of appellant, but merely in failure to recognize its mandatory obligation to dismiss for want of jurisdiction.

However, still assuming that previous contentions of appellee with respect to jurisdiction are erroneous, then it is unquestionably the law of this case that the District Court was entitled, in the exercise of dis-

cretionary jurisdiction, to refuse to hear the case on the merits.

The maritime decisions supporting this doctrine are fairly innumerable, those previously cited in this brief being merely illustrative. Only a few need be quoted.

> "Admiralty courts, it is said, will not take jurisdiction in such a case except where it is manifestly necessary to do so to prevent a failure of justice; but the better opinion is that, independent of treaty stipulation, there is no constitutional or legal impediment to the exercise of jurisdiction in such a case. Such courts may, if they see fit, take jurisdiction in such a case, but they will not do so as a general rule without the consent of the representative of the country to which the vessel belongs, where it is practicable that the representative should be consulted. His consent, however, is not a condition of jurisdiction, but is regarded as a material fact to aid the court in determining the question of discretion whether jurisdiction in the case ought or ought not to be exercised."
>
> *Ex parte Newman*, 81 U. S. 152, 168, 169; 20 L. ed. 877, 880.
>
> "As the assumption of jurisdiction in such case depends so largely on the discretion of the court of first instance, it is necessary to inquire how far an appellate court should undertake to review its action."
>
> *The Belgenland*, 114 U. S. 355, 368; 29 L. ed. 152, 157.

Upon reviewing the order of dismissal of the lower

court, this appellate court is bound to an affirmance unless it is forced to conclude that the trial court, acting arbitrarily, abused its discretion by rejecting jurisdiction. To determine the proper exercise of discretion, it becomes necessary to review all of the circumstances reflected by the record to the court below at the time of its action.

From the record it appeared to the District Court as follows: that appellant was an alien in this country, being a subject of the Netherlands; that at no time had he made any application to become a citizen of the United States; that appellant, in an American port, signed articles on a Norwegian vessel for a voyage to the Orient, during the course of which, outside the jurisdiction of the United States he was injured on the high seas, in May, 1922; that by such articles appellant expressly obligated himself in his relation to the respondent vessel to be bound by the Norwegian law; that such articles (R. 31) contained provision that disputes between appellant and the respondent vessel were to be referred to the Norwegian Consul, whose decision would be binding therein, until reviewed by a Norwegian court of justice; that within a few months following his accident, appellant instituted an admiralty suit before the United States District Court of Oregon for damages, wherein the Norwegian Consul intervened, objecting to exercise of jurisdiction, and praying that appellant's libel be dismissed and his claim be referred to the Consul for settlement under the Norwegian law; that in such previous litigation, Judge Bean considered not only the intervention of the

Norwegian Consul, but also considered the answer to appellant's libel, filed by the then owner of the respondent vessel, together with several depositions and numerous documentary exhibits submitted in behalf of the Norwegian steamship company; that the record in such former case reflected a complete and thorough knowledge on the part of the court before which the matter was pending, not only as to the attitude of the intervening Norwegian Consul, but also as to the merits of appellant's claims; that the result of the previous litigation was an order of dismissal, taxing costs against appellant and in favor of the Norwegian steamship owner and the Norwegian Consul; that the Norwegian Consul was not only able and willing to function in his official capacity, but that actually he had done so, securing for appellant substantial assistance and relief in the way of hospital, medical and nursing aid, to the extent of approximately $2000; that under the applicable Norwegian law, appellant at no time had any lien against the respondent vessel, but was confined in his remedy to compensation available under the Norwegian Seamen's Compensation Act; that after dismissal of the former proceeding by the District Court of Oregon, appellant instituted no appeal therefrom; that after the termination of the former litigation, the present litigation was not commenced for a period of approximately seven years—1924 to 1931; that when the present litigation was begun, the respondent vessel was no longer flying the Norwegian flag, but was flying the Japanese flag, having been purchased by the present appellee.

Under all these circumstances, plainly appearing in the record, to which the lower court presumably gave consideration, can it possibly be concluded on this appeal that Judge Cushman acted arbitrarily in an abuse of discretion, by refusing to exercise jurisdiction to hear the present cause on the merits?

## CONCLUSION

Appellee urges:

(1) That neither the lower court nor the appellate court ever acquired jurisdiction of the subject matter in this case because the Norwegian law of the ship's flag created no lien in favor of appellant against the respondent vessel, but, on the contrary, confined appellant for his remedy to the relief afforded by the Norwegian Seamen's Compensation Act; that neither the lower court nor the appellate court ever acquired jurisdiction of the subject matter in this case because, if ever a lien did exist in favor of appellant against the respondent vessel, that lien was released and the vessel purged thereof by the proceedings had in the United States District Court of Oregon; and that neither the lower court nor the appellate court ever acquired jurisdiction of the subject matter in this case because the applicable treaty between the Kingdom of Norway and the United States granted jurisdiction over appellant's claim to the Norwegian Consul, and denied jurisdiction to the admiralty courts of this country;

(2) That if the trial court in this case was clothed with discretion, the order of dismissal was entered in

the sound and wise exercise thereof, and not as the result of arbitrary abuse;

(3) That this court affirm the decision below, not only as to the dismissal of appellant's libel, but also as to the costs awarded to appellee, to secure which appellant filed stipulation for costs at the time this cause was instituted.

Respectfully submitted,

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